STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2007
v	No. 263278 St. Clair Circuit Court
COLEMAN WENDELL WALKER, Defendant-Appellant.	LC No. 04-002502-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug house, MCL 333.7405(1)(d). Defendant was sentenced, as a fourth habitual offender (MCL 769.12) to 3 to 20 years in prison on the possession charge, and 1½ to 15 years on the charge of maintaining a drug house. Because there was sufficient evidence to support defendant's conviction for possession with intent to deliver cocaine, defendant was not deprived of a fair trial or due process, and there was no prosecutorial misconduct, we affirm defendant's conviction and sentence for possession with intent to deliver less than 50 grams of cocaine. However, we reverse defendant's conviction of maintaining a drug house due to insufficient evidence.

Defendant's conviction arises out of items found during the execution of a search warrant at his ex-girlfriend's home. When the warrant was executed, defendant was found near the home's bathroom, in which the police located a set of keys, a black bag containing plastic baggies, a box digital scale, two pre-packaged bags of what appeared to be cocaine, and two additional bags containing white powder. The digital scale had pieces of paper on it with additional white powder. One of the baggies was determined to contain a cutting agent, but field testing indicated the remainder of the white powdery substances contained cocaine. A portion of the white powder was sent to the Michigan State Police Crime Lab, which verified that the substance was cocaine. In addition, defendant was found to have over $500 on his person, and the center armrest of a Cadillac in the home's driveway contained a black velvet jewelry bag, inside of which was a plastic baggy containing additional suspected cocaine.

Defendant first challenges the sufficiency of the evidence used to convict him. Appellate courts review challenges to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The reviewing court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that

the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).[1] Moreover, the prosecution did not have to rebut any and all theories that could prove defendant innocent, but only needed to present sufficient evidence beyond a reasonable doubt, in the face of contradictory evidence presented by defendant. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

> [T]o support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. [*People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992).]

In this case, there was ample evidence to support defendant's conviction for violating MCL 333.7401(2)(a)(iv).

Defendant never claimed that he might have been authorized to possess the cocaine. Additionally, although one bag of a white powdery substance found at the scene appeared to contain only cutting agent, field tests were performed that identified the remainder of the suspect substances found in the bathroom as cocaine. In fact, a sample sent to the Michigan State Police Crime Lab verified this result. In addition, although the testimony concerning the amount of cocaine found in the vehicle and in the bathroom is not entirely clear, it appears that at least 10 to 20 grams of suspected cocaine was recovered in total, including the 3.6 grams sent to the State Police Crime Lab. In other words, there was evidence that the cocaine was in a mixture weighing less than 50 grams.

The prosecution also presented sufficient evidence to establish an intent to deliver the cocaine. Specifically, defendant was found just outside the bathroom where several bags of cocaine were found along with a digital scale, a cutting agent, and additional plastic bags. Keys to the car that defendant arrived at the home in were also found in the bathroom, further connecting defendant to the drug paraphernalia found in the bathroom as well as to the additional suspected cocaine found in the car. The division of the drugs into several packages suggests that

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[1] Relying on *People v Young*, 89 Mich App 753, 763; 282 NW2d 211 (1979), cert den sub nom *Michigan v Young*, 445 US 927; 100 S Ct 1313; 63 L Ed 2d 760 (1980), defendant asserts that "'[a]n inference of criminality may be drawn from circumstantial evidence only if it follows "as an impelling certainty."'" *Id*., quoting *People v Strong*, 77 Mich App 281, 286; 258 NW2d 205 (1977), quoting *People v Davenport*, 39 Mich App 252, 257; 197 NW2d 521 (1972). However, the *Davenport* rule requiring the prosecution to disprove all innocent theories when its case is based on circumstantial evidence has since been disavowed. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

the cocaine was intended to be transferred to others, and the placement of drugs in close proximity to the digital scale and additional packaging materials further supports the inference that the drugs were intended to be transferred to others. See *Id.* at 524-525. Moreover, the fact that a cutting agent was also located with the drugs strongly implies that the cocaine was to be sold.

While the cocaine was not found on defendant's person, constructive possession of a substance exists if "the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. As indicated above, a sufficient nexus exists in this case. Considering the foregoing, we conclude that even aside from the statements allegedly made by defendant and Haskins to the police, sufficient evidence was presented to sustain defendant's conviction of possession with intent to deliver less than 50 grams of cocaine.[2]

With regard to defendant's conviction for maintaining a drug house, MCL 333.7405(1)(d) states in relevant part that a person "[s]hall not knowingly keep or maintain a . . . dwelling . . . that is used for keeping or selling controlled substances. . . " In *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), our Supreme Court, for the first time, analyzed the proper meaning of the phrase "keep or maintain" as contained in MCL 333.7405(1)(d)).[3] The Court noted that the definitions of the synonymous terms "keep" and "maintain" contain an element of continuity. As such, the Court concluded that "the phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence. . ." *Id.* at 155. The Court further opined:

> . . . we reiterate that "keep or maintain" is not synonymous with "use." Hence, if the evidence only shows that defendant used a [dwelling] to keep or deliver drugs on one occasion, and there is no other evidence of continuity, the evidence is insufficient to establish that defendant kept or maintained a drug [house] in violation of MCL 333.7405(1)(d).
> *Id.* at 157-158.

Here, defendant contends that there was insufficient evidence presented that he kept or maintained a drug house, where he did not live at the home and where there was no evidence presented to the jury that defendant sold drugs from the home on more than one occasion. After reviewing the evidence in the appropriate light, we conclude that while sufficient evidence was presented that defendant exercised control over the property for purposes of making it available for selling proscribed drugs on the night in question, no evidence was presented that such

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[2] Defendant also makes an argument concerning the corpus delicti rule, which goes to the admissibility of his alleged confession. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). In *Konrad*, our Supreme Court held that the corpus delicti of possession with intent to deliver cocaine is made up of evidence that the cocaine existed and was possessed by someone. *Id*. at 270. As discussed above, both elements were shown in this case.

[3] The Supreme Court rejected this Court's interpretation of the phrase "keep or maintain" set forth in *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999), that required a showing that the defendant's actions occurred "continuously for an appreciable period."

transactions previously occurred at the home or that drugs were kept at the home other than on the night of the raid.

According to the police officer in charge of the case, defendant admitted that he brought the drugs with him to the home on the night in question, which suggests that they were not kept there. Defendant's son, who resided with his mother at the residence, stated that he had not previously seen any cocaine in the house and his mother testified that she got out of bed to go to the bathroom approximately an hour before the execution of the search warrant and saw nothing in the bathroom. Moreover, while *Thompson, supra,* noted that its interpretation of the phrase "keep or maintain" required an element of continuity, which could be established through circumstantial evidence, it cannot reasonably be inferred from defendant's admission to narcotic sales in general and the fact that he appears to have brought cocaine to the home on the night in issue that he used the home to sell cocaine on any other occasion.

Because we are unable to deduce from what circumstantial evidence the jury might have inferred that defendant kept or sold drugs from the home on more than one occasion (thus, failing to establish the continuity element), we conclude that a rational trier of fact could not find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra* at 723. Accordingly, defendant's conviction for maintaining a drug house in violation of MCL 333.7405 must be reversed.

Defendant next asserts that the trial court abused its discretion by denying his motion for discovery of the dates on which previous controlled buys occurred and the serial numbers of the money used in the controlled buys so that those numbers could be compared to the serial numbers of the money found on defendant when he was arrested. We review the trial court's decision on defendant's discovery requests for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

Neither the search warrant nor its supporting affidavit is included in the record in this case. However, the police apparently participated in making controlled buys of narcotics from defendant on previous occasions, including on one occasion within the 36-hour period leading up to the execution of the search warrant. Defendant requested the dates of when the buys occurred on the basis that he could use the information to establish that certain aspects of the affidavit supporting the search warrant issued in this case are inaccurate. However, defendant has not argued that the search warrant was obtained in error or that the evidence seized as a result of the search warrant should be excluded. Rather, he simply argues that denying him the information violated his right to due process.[4]

There is no general constitutional right to discovery. *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). Defendant did, however, have a due process right to the discovery of information that was favorable to him and material to either guilt or punishment. *Id.* at 666. "Material has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.*

[4] US Const, Am XIV; Const 1963, art 1, § 17.

In this case, disproving previous controlled buys would not alleviate the inference that it was defendant who possessed the drugs found in the home on the night in question with the intent to distribute them. Nor would evidence that defendant might not have been present during previous controlled buys be relevant to defendant's conviction for maintaining a drug house, where evidence of those controlled buys was not used against him in support of that conviction. Because the desired evidence could not have raised a reasonable doubt as to defendant's guilt of the crimes charged, it was not material and defendant did not have a due process right to its discovery. *Id.* at 666.

One of the reasons defendant sought the requested discovery was to allow him to show that none of the money seized from him matched the money used to make previous controlled drug buys. With regard to this request, the court stated, "defendant does not set forth any reason why discovery of this information would be necessary in light of his confession, and the fact that the numbers of the money were not compared." Defendant complains that this statement by the court indicates that it was invading the province of the jury, concluding that defendant must be guilty because the officer in charge of the case testified that defendant confessed, and thus there was no point in bothering to permit defendant his discovery request.

We disagree with this assertion by defendant. In fact, the court was setting forth why the information was not material to the question of defendant's guilt. Put differently, because the serial numbers for the controlled buy money were not compared to the serial numbers from the money seized from defendant, it was evident that the controlled buy money was not going to be used to tie defendant to the previous narcotic sales. If the prosecution had attempted to infer defendant's intent with concern to the drugs found in the bathroom and his vehicle with such evidence, or if the prosecution had attempted to support the maintaining a drug house charge with evidence of previous controlled buys, then defendant would likely have been entitled to the requested discovery. But that is not what occurred. In this case, the simple fact that defendant might not have had controlled buy money on him at the time of his arrest was not relevant to the question whether he possessed the drugs found in the bathroom and his car with the intent to deliver them. Nor was it relevant to whether defendant maintained a drug house, where no evidence of previous sales was presented to the jury. Accordingly, the trial court did not violate defendant's right to due process by refusing to permit discovery of the cited material. *Id.*

Defendant next asserts that the trial court erred by permitting into evidence the white powdery substances identified as suspected cocaine but not sent to the Michigan State Police Crime Lab for further testing and testimony concerning the same. This issue was not raised before, addressed, or decided by the trial court. Accordingly, it is not preserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because the issue is unpreserved, it is reviewed for plain error affecting substantial rights. *Carines*, *supra* at 763.

First, we note that only photographs of the suspected cocaine were admitted into evidence, and not any of the suspected cocaine itself. Second, we fail to see how this evidence and testimony would have been prejudicial, even if it was admitted in error. Defendant was charged with possession with intent to deliver less than 50 grams of cocaine. The police sent 3.6 grams of the white powdery substance found in the bathroom to the crime lab, and the lab verified that it contained cocaine. Moreover, the laboratory-identified cocaine was found with a digital scale, cut, and plastic baggies and testimony was presented that other bags of a white

powdery substance were weighed and field tested at the scene. This evidence was sufficient to convict defendant of possession with intent to deliver less than 50 grams of cocaine.

Second, we see no plain error in the admission of the testimony concerning the substance. It appears that most of the substances identified as suspected cocaine were subjected to field testing that indicated the presence of cocaine in all of the substances tested, except for one bag that contained a cutting agent. The police officer who conducted the field tests testified regarding how the field tests work and his extensive experience with the tests, and noted that in his experience, no substance that field tested positive for the presence of cocaine was subsequently found not to contain cocaine when tested by the Michigan State Police Crime Lab. He also testified that except for the cutting agent, the substances appeared consistent with his past observations of cocaine. Accordingly, the majority of the substances identified as suspected cocaine were qualitatively tested, and, at least arguably, a proper foundation was laid for the identification of the substances as suspected cocaine. In fact, defendant's objection really would be better addressed to the weight of the evidence rather than its admissibility. *People v Koehler*, 54 Mich App 624, 633-634; 221 NW2d 398 (1974).

Defendant suggests that the testimony concerning the identification of the suspected cocaine could only be admitted if the police officer whose testimony is challenged were first qualified as an expert. However, the police officer was qualified to testify as an expert, and could have been offered as an expert if defendant had raised an objection to his testimony at the time of trial.[5]

Defendant, citing *People v Vasser*, unpublished opinion per curiam of the Court of Appeals, decided April 1, 2003 (Docket No. 231246), next asserts that the trial court erred by failing to award him credit for the time he served in jail following his arrest in the instant matter. In addition to the fact that an unpublished opinion is not binding, MCR 7.215(C)(1), we explicitly concluded in *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), that credit for time served in jail as a parole detainee may only be applied to the sentence from which the parole was granted. See also MCL 768.7a(2); MCL 791.238(2). Accordingly, defendant is not entitled to jail credit against the sentences he received in this case.

[5] The admission of expert testimony requires that: (1) the expert be qualified; (2) the evidence give the trier of fact a better understanding of the evidence or assist in determining a fact at issue; and (3) the evidence be from a recognized discipline. *In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002). An expert may be qualified by knowledge, skill, experience, training, or education. MRE 702. Here, the officer in issue testified that he had been assigned to the drug task force for approximately eight years in total, had received related training including training to identify controlled substances, had worked on over 500 narcotics investigations, and had instructed others in the use of narcotics field tests. Further, the evidence he provided aided the jury's understanding of what was found in the bathroom and the car and helped clarify why not all of the evidence was sent to the Michigan State Police Crime Lab. "There is also no serious question that drug-related law enforcement is a recognized area of expertise." *People v Williams* (*After Remand*), 198 Mich App 537, 542; 499 NW2d 404 (1993).

Defendant next complains that he was denied a fair trial by prosecutorial misconduct. Because the issues raised were not preserved by timely objection below, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312; 329; 662 NW2d 501 (2003). Further, appellate review of this unpreserved issue is only for plain error. *Id*.

At the crux of a claim of prosecutorial misconduct is the question whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A reviewing court must examine the record and evaluate the prosecutor's remarks in context, including any pertinent defense arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *Callon*, *supra* at 330. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

Defendant asserts that the prosecutor incorrectly told the jury during voir dire that if defendant had the right to control the cocaine then he was guilty.[6] In fact, when read in context it is clear that the prosecutor was simply explaining the concept that someone does not have to hold an object in their hand in order to have possession of the object. And while the prosecutor did question the jurors about whether they would find defendant guilty if he were found to have constructive possession of the drugs, the prosecutor also clearly went through the other elements necessary to convict defendant of possession with intent to deliver. Moreover, there is no claim that the trial court failed to adequately instruct the jury with regards to the elements of each charged crime. The trial court properly instructed the jury on the elements of possession with intent to deliver, and informed the jury that if the lawyers said something different about the law that they should follow its instructions and not those of the attorneys. Jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

According to defendant, most of the prosecutor's errors concerned the burden of proof and the concept of reasonable doubt. Specifically, defendant complains that the prosecutor improperly questioned the jury as to whether they would find defendant guilty if they believed, or found it reasonable to believe, that defendant was guilty. However, the prosecutor repeatedly emphasized that she had the burden of showing beyond a reasonable doubt that defendant committed the crimes charged. Thus, when read in context the complained of remarks do not clearly suggest that the prosecutor was attempting to lower the standard of proof that she had to meet. In fact, in the one instance where the prosecutor is alleged to have specifically stated that that the trial court would *not* inform the jurors that they had to find defendant guilty beyond a reasonable doubt, the prosecutor indicated the opposite in the preceding sentence, demonstrating that at worst, this was a slip of the tongue. Because a timely cautionary instruction could have cured any error, reversal is not required on this basis. *Callon*, *supra* at 329. Moreover, the trial court also repeatedly emphasized that the burden was on the prosecution to establish beyond a

[6] Defendant also asserts that the prosecutor mislead the jury during voir dire when discussing the charge of maintaining a drug house, however, because of our conclusion that there was insufficient evidence presented to sustain this charge, we decline to address defendant's claims of misconduct specifically related thereto.

reasonable doubt that defendant committed the crimes charged. Again, the jurors are presumed to have followed these instructions. *Graves*, *supra* at 486. Accordingly, there is no plain error requiring reversal.

Defendant also asserts that the prosecutor improperly told the jury that they should compare defendant's and plaintiff's versions of events and determine which one makes more sense. Read in context, however, it is clear the prosecutor was attempting to simply clarify why the prosecution witnesses should be believed. A prosecutor may permissibly argue that a witness is or is not worthy of belief. *Thomas*, *supra* at 455.

Defendant next argues that the prosecutor erred by eliciting testimony from the officer in charge of the investigation that defendant and the homeowner's statements to the officer on the night in question corroborated one another. According to defendant, this was improper because it called for one witness to comment on the credibility of another. While it is true that this Court has stated that "[i]t is generally held improper for a witness to comment or provide an opinion on the credibility of another witness," *People v Williams*, 153 Mich App 582, 590; 396 NW2d 805 (1986), that is not what occurred here. In fact, because the homeowner had not yet testified concerning her conversation with the officer when the officer made the challenged remark, the officer could not be said to have been commenting on her credibility at the time this question was asked and answered. Because defendant has not identified any plain error, he is not entitled to reversal on this basis.

Defendant also claims the prosecutor erred by eliciting the testimony concerning the suspected cocaine that was not sent to the Michigan State Police Crime Lab for additional testing. Because defendant has identified no plain error in the admission of that testimony, defendant has also failed to establish that eliciting the testimony was error. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant also claims that the trial court erred by failing to sua sponte stop the prosecutor from committing misconduct. However, because defendant has not shown any misconduct on the part of the prosecutor, the trial court cannot be faulted for failing to act. Similarly, defendant's cumulative effect argument is without merit. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Finally, defendant asserts based on the issues discussed above that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), lv den 467 Mich 852 (2002). "The remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered." *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995).

Were defense counsel ineffective for failing to move for a directed verdict on the charge of maintaining a drug house, the appropriate remedy would be to reverse defendant's conviction of the charge of maintaining a drug house, which we have already concluded is proper due to the lack of evidence on the continuity element. Because defendant has not otherwise identified how

his counsel's performance fell below an objective standard of reasonableness, we conclude that defendant's claim of ineffective assistance based on the other issues he has raised in his brief on appeal must fail.

We affirm defendant's conviction and sentence for possession with intent to deliver less than 50 grams of cocaine, but reverse defendant's conviction of maintaining a drug house. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto